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No. 08-322

IN THE
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE HONORABLE CONGRESSMAN JOHN LEWIS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES AND INTERVENOR-APPELLEES

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STATEMENT OF INTEREST

Amicus Curiae is the United States Representative of Georgia's Fifth Congressional District, which includes the entire city of Atlanta, Georgia and parts of Fulton, DeKalb and Clayton counties, and has served in that capacity since January 1987.[1] *Amicus* respectfully submits this brief in order to urge the Court to affirm the decision of the District Court for the District of Columbia and uphold the constitutionality of Section 5 of the Voting Rights Act of 1965.

Today, political historians and constitutional scholars acknowledge that the main impetus for President Lyndon Johnson submitting the Voting Rights Act to Congress on March 15, 1965, and its passage by both Houses of Congress a mere five months later was the brutalization of non-violent civil rights marchers on the Edmund Pettus Bridge in Selma, Alabama by state troopers. *Amicus* was one of the marchers on that day and, like many of his fellow nonviolent civil rights demonstrators, was beaten with bullwhips, choked with toxic tear gas, and nearly trampled by horses simply because he wished to exercise his constitutional right to vote. *Amicus* does not doubt that the Court will receive numerous well-crafted submissions by the parties and their supporters debating the technical merits of their positions on the

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[1] Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of the brief. The written consent of the Solicitor General of the United States accompanies this brief. The remaining parties have consented to the filing of this brief by filing blanket letters of consent.

constitutionality of the Voting Rights Act. *Amicus* does not intend for this brief to add to the volume of arguments. Rather, as explained below, *Amicus* merely hopes to attest personally to the high price we paid for the enactment of the Voting Rights Act and the still higher cost we might yet bear if we made the mistake of discarding now one of the most vital tools of our democracy.

SUMMARY OF ARGUMENT

No statutory enactment has been more important to the advancement of voting rights for all Americans than the Voting Rights Act of 1965. It is quite simply one of the most significant and influential pieces of legislation Congress has passed. If, as the late President Ronald Reagan once declared, the right to vote is "the crown jewel of American liberties,"[2] the Voting Rights Act of 1965 in general -- and the pre-clearance provisions of Section 5 in particular – is the one piece of legislation that made this crown jewel not just the prized possession of a fortunate few but the birthright of all Americans: It broke the back of Jim Crow segregation, made a place at the table of civic and political life for millions of Americans, and moved us closer to the goal of the "more perfect union" we envisioned at our founding and are still working to achieve today. In sum, the Voting Rights Act made us a better people and America a better place.

And yet, as vital to American democracy as the Voting Rights Act of 1965 has turned out to be, and for

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[2] President Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982 (June 29, 1982), available at http://www.reagan.utexas.edu/archives/speeches/1982/62982b.htm.

all its success in permitting all Americans to fully participate in the political process, it has always endured, and continues to endure, high-pitched criticism. When it was enacted, as now, we were told not only that the law worked an illegitimate interference with state authority, but that, if we just let each state's political system regulate itself, blacks, other racial minorities, and members of vulnerable classes would achieve fair political representation through the equivalent of the political free-market. At the heart of the argument against Section 5 of the Voting Rights Act lies this unfounded belief that our history has been one of ever forward-moving progress and that we have now arrived at a perfected democratic state, where every piece of legislation or court decision, aiming to guarantee equal rights will only hinder even greater progress.

But, as the late Justice Thurgood Marshall observed on the occasion of the Bicentennial of the United States Constitution, American democracy has always been an ongoing and evolving project.[3] That is to say, democracy is not a fixed state but a series of steps we consciously take day in and day out when we march toward a more enlightened society. One of the first steps toward that more enlightened society was taken when *Amicus* and other marchers walked onto Selma, Alabama's Edmund Pettus Bridge on March 7, 1965. In the ensuing years, as a nation we have marched many more steps to keep faith with our democratic ideals every time we have reauthorized and upheld the constitutionality of the Voting Rights Act.

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[3] Thurgood Marshall, Reflections on the Bicentennial of the United States Constitution, 101 Harvard L. Rev. 1 (1987).

Our march is not yet over and we cannot and should not stop now.

ARGUMENT

I

THE VOTING RIGHTS ACT OF 1965 IN GENERAL AND THE PRE-CLEARANCE PROVISIONS OF SECTION 5 IN PARTICULAR REMAIN CRUCIAL IN OUR EFFORTS TO PROTECT THE RIGHTS OF ALL AMERICANS TO VOTE FREE FROM RACIAL DISCRIMINATION

The right to vote is the bedrock of American democracy. Section 5 of the Voting Rights Act was intended to safeguard that right for millions of Blacks, Asians, Latinos and other racial minorities, by prohibiting voting discrimination that might otherwise worsen the position of minority voters. In significant ways, the Voting Rights Act has proved a remarkable success. In 1964, there were only 300 black public officials nationwide. Today there are more than 9,100, including 43 members of Congress. Its expansion in 1975 to include language minorities helped account for the nearly 6,000 Latinos who today hold state or federal office, including 21 members of Congress.

Though there are no more literacy tests and grandfather clauses, today's tools are discriminatory redistricting and annexation plans, at-large elections schemes, unexpected re-registration requirements, sudden polling place changes, and the development of new rules for candidate qualification. All of these methods are used to discriminate against minorities and have led to over 620 objections by the Department of Justice between 1982 and 2006.

To cite just a few specific examples of schemes that call for the continuing need for Section 5, in Georgia alone, the Justice Department has objected to 80 voting changes since the Section 5 reauthorization in 1982. While the State's Governor insists that Georgia should be relieved of the pre-clearance provisions, local newspapers have amply documented the numerous attempts by the state legislature to enact laws that would have a detrimental impact upon blacks and other racial minorities.[4]

In 2002, a state court judge sitting by designation as Superintendent of Elections of Randolph County, Georgia, issued an opinion that an African American member of the Randolph County Board of Education named Henry Cook, was a resident of District 5, the majority black district from which he had been elected. In 2006, however, the County Board of Registrars, all of whose members were white, removed Cook from District 5 and reassigned him to District 4, a majority white district. Given the history of racial bloc voting in Randolph County, Cook would almost certainly have been defeated had he run for reelection in District 4. Randolph County refused to submit Henry Cook's reassignment for preclearance under Section 5, even though it constituted a change in voting. A three-judge court enjoined further use of the change absent preclearance in 2006, in response to a lawsuit filed by black residents of the county against the Board of Registrars. The Board of Registrars then submitted the change for preclearance, and the Department of Justice objected. The Justice Department cited the absence of any intervening

[4]http://www.onlineathens.com/stories/032009/opi_412284106.shtml.

change in fact or law since the 2002 decision of the state court judge, and ruled that in light of the history of discrimination in voting in the Randolph County, the County failed to sustain its burden of showing that the submitted change lacks a discriminatory purpose.

Even more recently in Georgia, just before the 2008 General Election last November, the State of Georgia implemented a new citizenship verification program for voter registration applicants without obtaining preclearance under Section 5 of the Voting Rights Act. Private parties brought suit against the State under Section 5 and the Georgia Attorney General specifically requested that the State comply with Section 5 and submit the change for review. After the submission was made, the Attorney General requested additional information, and that request remains outstanding. These events surrounding the 2008 presidential election provide a very recent example of the State's failure to comply with Section 5's requirements and undercuts claims presented in *Amici* Perdue's brief to this Court.

II

THE ATTACKS ON SECTION 5 OF THE VOTING RIGHTS ACT AS OVERBROAD AND UNNECESSARY ARE MISLEADING AND WITHOUT MERIT

In spite of its successes, from the time it was first proposed, the pre-clearance provisions of the Voting Rights Act were challenged as an unnecessary and unwelcome abrogation of state authority by the federal government. When Section 5 was first enacted, states that fell within its purview depicted the legislation as a wholesale bureaucratic intrusion by an all-powerful federal government on its federalist subordinates, the state and local governments.[5] In the very first challenge to the pre-clearance provisions taken up by the Court, "South Carolina contend[ed] that . . . only the judiciary [had the authority] to strike down state statutes and procedures [as inconsistent with the Fifteenth Amendment]," and that Congress lacked the constitutional authority to implement the Act. *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1965). Fifteen years later, the City of Rome, Georgia mounted a similar challenge, claiming that Congress in 1965 lacked the constitutional authority to pass the Voting Rights Act, and "in the alternative, that, even if the Act and its pre-clearance requirement were appropriate means of enforcing the Fifteenth Amendment in 1965, they had outlived their usefulness by 1975[.]" *City of Rome v. United States*, 446 U.S. 156, 180 (1975).

It is, therefore, disheartening, though perhaps unsurprising, that today Section 5 is yet again being

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[5] Howard Ball et al., *Compromised Compliance: Implementation of the 1965 Voting Rights Act* 52-53 (1982).

challenged on essentially the very same grounds that opponents of the legislation offered when it was first proposed and continued to proclaim every single time Section 5 came up for renewal; namely that, on the one hand the Act goes too far and that, on the other hand, so much progress has been made that covered states should be relieved from the "burdens" of pre-clearance. Indeed, in a brief submitted to the Court in support of the argument that Section 5 is no longer necessary due to Georgia's progress in voting rights matters, Georgia Governor Sonny Perdue quotes present *Amicus* as stating"[I]t's a different state, it's a different political climate, it's a different political environment. It's altogether a different world that we live in really."[6]

In so doing, Governor Perdue, and others who would oppose Section 5, completely misunderstand and mischaracterize the position that *Amicus* has consistently maintained regarding the necessity of Section 5.[7] As Amicus stated during a floor debate in response to a colleague who had similarly mischaracterized his position:

> Let me say to my friend and to my colleague from the State of Georgia, it is true that years ago I said that we are in

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[6] Brief of Georgia Governor Sonny Perdue as Amicus Curiae In Support of Appellant,
at 6, Nw. Austin Mun. Util. Dist. No. One v. Holder, ___ U.S. ___ , ___ S. Ct. ___.

[7] *See* H5164 (Statement of Rep. John Lewis) ("Yes, we have made some progress. We have come a distance. We are no longer met with bullwhips, fire hoses, and violence when we attempt to register and vote. But the sad fact is, the sad truth is discrimination still exists, and that is why we still need the Voting Rights Act. And we must not go back to the dark.

> the process of laying down the burden of race. But it is not down yet… The Voting Rights Act was good and necessary in 1965 and it is still good and necessary today. So don't misquote me. Don't take my words out of context.[8]

As a member of Congress, *Amicus* can testify that reauthorization of Section 5 involved serious deliberation. The arguments like those raised by appellants were given serious consideration and some members initially were of the view that Section 5 had served its purpose. But in the end, based upon the facts presented to Congress, an overwhelming majority of Democrats and Republicans voted to reauthorize the pre-clearance provisions.

The truth is while the experience of *Amicus* in Congress has left him convinced of the continued need for the Voting Rights Act (but respectful of others who sincerely believe otherwise), it has made him, if anything, less patient about some of the abstract, high-pitched arguments against it. Much too often these arguments seem completely divorced from the evidence of history and daily life in the United States. *Amicus* grew up in a time when his fellow citizens looked upon him as a member of a lower caste because he was black and for no other reason. In ways large and small and to an extent that can never be fully conveyed on the page, he was reminded with brutal clarity that he was worth less as a human being than others who happened to be white. The fact that he, and many of his friends and colleagues who died in what is now referred to as the Civil Rights Movement, refused to submit to such an

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[8] *See* H5150 (Statement of Rep. John Lewis).

unjust system is perhaps less a testament to their personal courage than a simple demonstration of their faith in the redeeming power American democracy. And, although it may have seemed, in 1965, that the pre-clearance requirement was an unorthodox imposition, Congress votes every day on legislation that requires States to comply with detailed and sometimes onerous requirements of federal agencies, or that conditions federal funding on substantial changes in State and local laws, or that extinguishes long-established State common law rights with barely a second thought.[9] In 1960, five years before enactment of the Voting Rights Act, James Baldwin wrote: "what is honored in a country is cultivated there."[10] Given the transcendent importance of the right to vote, the history that led to the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, the history of their decades-long non-enforcement, and the powerful federal interest in fair and open elections for federal office, Section 5 of the Voting Rights Act would seem to be nothing less than the cultivation of the American democratic ideals we profess to honor.

In the final analysis, it cannot be denied that as a nation we have made enormous progress toward equal rights for all Americans. But the danger of accepting the argument that we have made so much progress that we no longer need the very tool that made all that progress possible is that we will forget

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[9] *See*, e.g., National Environmental Policy Act, 42 U.S.C. § 55.

[10] James Baldwin, In Search of a Majority, collected in The Price of the Ticket 231 (1985).

one of the most important lessons history has to teach us, namely:

> that revolutions and advances in popular rights and democratic rights can be reversed; that history can move backward; that enormous gains can be lost and jeopardized, eroded, or diluted, and abridged in spite of the enormous cost that those advances have made. The first [R]econstruction cost us our greatest bloodshed and tragedy. It would seem that if anything has been paid for at a higher price, it was these advances. And yet, they were eroded and lost, and only a century later they were restored.[11]

[11] Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 97th Cong. 2027 (1982) (statement of C. Vann Woodward, Professor Emeritus of History, Yale University).

CONCLUSION

For the foregoing reasons we pray the Court affirm the decision of the District Court for the District of Columbia and affirm the constitutionality of Section 5 of the Voting Rights Act.

Respectfully submitted,

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